

## EPILOGUE

JOSEPH G. HUTCHESON, JR.†

IN addition to the general pleasure I feel as a lawyer and judge in having a part in this symposium in honor of Mr. Justice Cardozo, one of the Judicial Great, I feel a greatly personal pleasure and satisfaction because I knew him personally and admired him greatly, and because in an article I wrote some thirty years ago, I leaned strongly on, and drew great support from, some of his writings.<sup>1</sup> Moreover, it was his friendly and understanding reception of that article, particularly of its striking and, to the uninitiated, misleading title<sup>2</sup> which enabled it to pass muster without being attacked and torn to pieces.

Grateful as I am to him, however, for the good word he put in for my article, I am more deeply grateful for his outstanding contribution as a judge to the decision of actual cases. This contribution developed from his firm and steadfast recognition of, and adherence to, the guiding principle of decision that, while a judge should let his mind be bold in the consideration and use of precedents so as to avoid undue bondage to the letter of the law and to release its true and verdant spirit, he must do so as a judge and not as a legislator. That is, while the judge must sometimes be, he cannot appear to be, arbitrary. He must at least appear reasonable and conforming, and unless he can find a category which will at least "seemably" support his view, he will feel uncomfortable. Sometimes he must almost invent a category, but he can never do quite that, for he cannot refuse to recognize that the growth of the law is interstitial and that a new category, which he may find useful directly or by

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1. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929).

2. Justice Cardozo correctly apprehended and explained the meaning intended by me when he wrote of the key word "Hunch":

The doctrine of the hunch, if viewed as an attempt at psychological analysis, embodies an important truth; it is a vivid and arresting description of one of the stages in the art of thought. The hunch is the divination of the scientist, . . . the apocalyptic insight, that is back of his experiments. . . . The intuitive flash of inspiration is at the root of all science, of all art, and even of all conduct.

CARDOZO, *SELECTED WRITINGS* 27-28 (Hall ed. 1947), adding, however:

I do not mean that there was any such misapprehension in the mind of the distinguished judge and author by whom the hunch may be said to have been given its card of admission into the polite society of juristic methodology. I am fearful, however, that the newcomer's importance, even if justly rated by its sponsor, has been exaggerated by others.

*Id.* at 26.

Cardozo expressed the fear that the nomenclature might tend to "establish the empire of mere feeling or emotion, of arbitrary preference, and by the same token to disprove the value of conceptions, rules and principles, the value of all logic, till we are driven, like the sophist in the Greek comedy, to proclaim that Whirl is King." *Ibid.*

analogy, and on which he may rely to support his desired result cannot be new enough wholly to avoid contact with, and placement among, prior related categories.

In my article, *Judgment Intuitive*, I undertook, in a personal sort of way to make the point that, while a judge may not completely reject settled, that is established, law merely because he does not like the results of its application to a particular case, he has the right, indeed the duty to make use of all lawful expedients supporting him in the result he desires to reach and announce, and I drew heavily on Mr. Justice Cardozo and quoted copiously from him. I did not mean to espouse, just as he did not espouse, the right of a judge completely to disregard or reject all the applicable precedents in favor of a solution merely because in his opinion abstract justice supported his desired result. A reading of his leading opinions, *McPherson*, *Palsgraf*, and others shows how far this was from his mind and thinking.

In Texas many years ago one of our judicial great ones, Mr. Justice Roberts, set down the guiding rule which has prevailed in our state, and I think generally elsewhere:

Whoever undertakes to determine a case solely by his own notions of its abstract justice, breaks down the barriers by which rules of justice are erected into a system, and thereby annihilates law.

A sense of justice, however, must and should have an important influence upon every well organized mind in the adjudication of causes. Its proper province is to superinduce an anxious desire to search out and apply, in their true spirit, the appropriate rules of law. It cannot be lost sight of. In this, it is like the polar star that guides the voyager, although it may not stand over the port of destination.

To follow the dictates of justice, when in harmony with the law, must be a pleasure, but to follow the rules of law, in their true spirit, to whatever consequences they may lead is a duty. . . .<sup>3</sup>

In my article I fully recognized that this must be the guiding rule if one would judge aright, and I thought then, and think now, that Mr. Justice Cardozo was of the same mind. What he did and did so well, with such admirable technique, was that, while refusing to follow precedents blindly, he was able, by the use of analogies and other aids to right thinking, to free the law from the bondage of slavishly extending a precedent by disregarding its real *ratio decidendi* and giving it a scope which, whether or not intended by its makers, it was really not entitled to have.

If Mr. Justice Cardozo had done nothing but write the charming books he wrote on the law, he would have made a great contribution to it, but his contributions became transcendent when he put into practice, and showed others how to put into practice, in actual cases the ideas which his books had so effectively conveyed. In short, joining theory to practice, he not only taught a theoretical lesson but gave to those who decided to follow his teaching practical guides on and examples of how to do so.

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3. *Duncan v. Magette*, 25 Tex. 245, 253 (1860).